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No. 98-1666

In the Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SANTA MARIA, CALIFORNIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner City of Santa Maria ("Santa Maria"), respondent in *Ruiz v. City of Santa Maria*, No. 96-56564 (9th Circuit Court of Appeals), seeks a writ of certiorari ("Petition") ordering the deletion of parts IV.B and IV.D of the Ninth Circuit panel majority opinion ("Opinion") issued in this case on November 5, 1998. The Opinion reversed a trial court ruling dismissing this Section 2 Voting Rights Act case challenging Santa Maria's at-large election system, and remanded it back to the district court for trial. (The Opinion appears at App., 1a-35a, in Santa Maria's Petition.)

One of the panel members (Wallace, J.) dissented from parts IV.B and IV.D of the Opinion, which set forth evidentiary standards intended to guide the trial court on remand. The continued inclusion of parts IV.B and IV.D in the Opinion will produce legally unsound results in this and other Voting Rights Act cases, as well as undermine the validity of previous Voting Rights Act decisions in the Ninth Circuit. (Petition, p. 15.)

Part IV.B of the Opinion contains the unprecedented holding, contrary to existing Supreme Court and Circuit Court of Appeal cases, that the trial court should give less evidentiary weight to the success of an Anglo candidate who was Hispanic voters' first choice than to the defeat of an Hispanic candidate who was Hispanic voters' second preference, *solely on account of race*. Part IV.D of the Opinion authorizes the trial court to discount elections which Hispanic candidates won, on grounds of "special circumstances" allegedly due to pending voting rights litigation, solely because Anglo voters gave more votes and financial support to those candidates than to previous Hispanic candidates, without determining whether the greater

Anglo support was an attempt to thwart the lawsuit or was simply a reaction to the quality of the candidates, strength of the campaigns or other *nonracial* factors.

The Petition seeks deletion of these two legal holdings because they are contrary to and overlook the established voting rights jurisprudence of this Court, and other Circuit Courts of Appeal, and raise issues of exceptional importance on rules of national application as to which there is a need for national uniformity. The Petition, then, fully satisfies the requirements of Supreme Court Rule 10. Respondents, however, improperly seek to reframe these legal rulings that are contrary to this Court's voting rights decisions into disputed factual issues that are plainly irrelevant to the legal issues presented in the Petition.

I. THE PANEL MAJORITY, IN ACCORDING MORE EVIDENTIARY WEIGHT TO LESSER PREFERRED HISPANIC CANDIDATES THAN TO MORE PREFERRED ANGLO CANDIDATES SOLELY BECAUSE OF THEIR RACE, CONFLICTS WITH SETTLED VOTING RIGHTS JURISPRUDENCE

The Panel majority, Petitioners and Respondents all agree that Anglo candidates can be the preferred candidate of minority voters. Numerous cases, including Supreme Court and Ninth Circuit cases, so hold. (Opinion, App., 12a-13a.)

In all the hundreds of decided voting rights cases, however, *not one* (until now) has ever held that less weight should be accorded to an Anglo candidate who was the first preference of minority voters and won, than to a minority candidate in the same election who was the second preference of minority voters and lost, *solely on account of the candidates' race*. In effect, the Panel majority announces

a new rule that Anglo candidates can be the preferred choice of minority voters, even the first choice, but the electoral success of such candidates is without legal consequence in a Section 2 Voting Rights Act "vote dilution" analysis under *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), if lesser preferred minority candidates also do not win in that same election. This unprecedented new legal standard cannot be squared with existing Supreme Court precedent, and thus merits review by this Court.

Respondents attempt to confuse the issue before the Court by offering up inapposite cases that give more evidentiary weight to minority-Anglo contests than to elections with only Anglo candidates, *see, e.g., Rural West Tenn. African American v. Sundquist,* 29 F. Supp. 2d 448, 456 (W.D. Tenn. 1998) (black-white elections more probative than white-white elections), or that involve multiple seat elections with only one minority candidate preferred first so that minorities must necessarily prefer an Anglo candidate second. (See Oppos., p. 8.) Those are not the facts of this case. The issue before this Court concerns elections with Anglo and minority candidates in which *minorities preferred an Anglo candidate over a minority candidate.* The cases regarding non-racially contested elections cited by plaintiffs are irrelevant. Respondents, in effect, simply fail to answer, or answer adequately, the dispositive legal contentions presented in the Petition:

1. **Racial Stereotyping.** The most dramatic reason why the Opinion's new legal standard, giving more weight to lesser preferred Hispanic candidates than to more preferred Anglo candidates solely on the basis of race, is contrary to law, is the Supreme Court's admonition against racial stereotyping. (Petition, p. 13.) Respondents' Opposition (p. 8) barely responds to this seminal Supreme Court rejection of "political apartheid," offering only the glib,

conclusory statement that this Court's ruling will not "hamper" the District Court's ability to determine if minority voters' ability to elect their chosen representatives is inferior to white voters. This comment begs the question and is wholly nonresponsive to Santa Maria's argument that the majority's ruling is unconstitutional and contrary to Supreme Court precedent. This conflict with Supreme Court authority raises an issue of exceptional importance that warrants review by this Court.

2. **Minority Voter Cohesion.** The second of the three essential preconditions set forth in *Thornburg* for a Section 2 Voting Rights Act case is minority voter political cohesion. *Id.* at 50-51. As noted in the Petition (pp. 16-17), the Panel majority's new legal standard conflicts with this requirement, as it would turn minority losses in 1988 and 1992 due to lack of cohesion into ones that can be characterized as due to vote dilution. Suppose Hispanic voters were not cohesive and supported Anglo candidates as frequently as Hispanic candidates. Suppose it were always true that Hispanic voters gave more votes to Anglo candidates than to Hispanic candidates. The majority opinion plainly overlooked *Thornburg*'s "cohesion" requirement, which part IV.B does not even address. Nor do Respondents address this conflict with *Thornburg*, which merits review by this Court.

3. **Totality of Circumstances.** Petitioners (at pp. 16-17) also noted that the Panel majority's new legal standard contravenes the "totality of the circumstances" test mandated by *Johnson v. De Grandy*, 512 U.S. 997, 1009-13, 114 S. Ct. 2647, 2656-58 (1994). Suppose the controlling Anglo power structure organizes to support a captive Hispanic candidate only lukewarmly supported by Hispanics and who loses, while an Anglo candidate married to an Hispanic and enthusiastically supported by Hispanics wins.

The majority's standard would turn a triumph for Hispanics into a defeat. This is the fundamental problem with the majority's legal standard: it turns what should be a fact specific, case by case inquiry into a generally applicable legal standard, regardless of the facts pertaining to a specific election as to which its application would not make much sense. Respondents do not address this conflict with *Thornburg*'s totality of circumstances inquiry (nor does part IV.B), which merits review by this Court.

4. **Vote Dilution.** Petitioners noted (at p. 17) that the majority's new legal standard conflicts with *Thornburg*'s ultimate vote dilution conclusion by giving more weight to an unsuccessful second preference who would not have been elected anyway because Hispanics could form but one majority single member district. (Petition, pp. 7-8, 17-18). Thus, by definition, the defeat of the second Hispanic candidate cannot constitute "vote dilution." (*Id.* at 17-18.) What matters in this case is who the first preference was and whether that preference won, not that the second preference lost.

Again, Respondents (and part IV.B) are silent on this conflict with *Thornburg* except to note that historically Hispanics had not been elected to the City Council when their portion of the City's population was much less. (Petition, p. 7.) This case is very similar to *Aldasoro v. Kennerson*, 922 F. Supp. 339, 360, 362 (S.D. Cal. 1995), in which Hispanic candidates had lost at-large, but eventually won because Hispanic voters achieved the ability to elect at-large through changing demographics, so that there was no current condition of vote dilution at the time of trial. More recent elections like those in 1994, then, are more probative of whether a *current* condition of vote dilution exists, if there have been significant demographic changes that improve a minority group's ability to elect at-large as is true in this

case. (Petition, pp. 19-20.) The historical Hispanic candidate losses cited by plaintiffs, moreover, were unaccompanied by any analysis of whether these unsuccessful Hispanic candidates were the preferred candidates of Hispanic voters and thus are of no probative value. *Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992) ("appellants too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority peferred candidates").

5. **Ninth Circuit Decisions.** Respondents did not respond to the point in the Petition that cases decided in the Ninth Circuit perhaps would have been decided differently under the majority's new legal standard, and thus the Opinion in effect undermines the validity of these previously decided cases, unless part IV.B is deleted from it. (Petition, pp. 9, 15.)

6. **Gomez.** In *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 1534 (1989), the Ninth Circuit established the rule, consistent with *Thornburg*'s minority political cohesion requirement, that cohesion is to be determined on the basis of "voting preferences expressed in actual elections" (*id.* at 1415) and that courts are to look "only to *actual voting patterns*" (*id.* at 1416). The Panel majority's legal standard, by giving more weight to lesser preferred minority candidates conflicts with *Gomez* and denies the legitimacy of expressed minority voter preferences. Respondents ignore *Gomez* completely.

7. **The Sixth Circuit.** The Panel majority claims that the only case to address the issue of whether more weight should be given to minority preferred candidates who lose is *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109, 115 S. Ct. 1960 (1995). Petitioners, however, distinguished *Clarke* by noting that it

never makes clear whether black preferred Anglo candidates received greater black support than losing black candidates (Petition, p. 15), an argument to which Respondents do not respond.

The Panel majority also overlooked the recent Sixth Circuit case of *Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998) which squarely rejects the Panel majority's new standard ("The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority preferred candidates, whatever their race, usually lose"). Respondents mischaracterize *Cousin* as simply continuing the 6th Circuit practice of examining all elections. *Cousin*, however, is plainly at odds with the Opinion which overlooked it.

The Petition gave seven compelling reasons why a writ of certiorari should be granted. Respondents barely respond at all to three of those arguments (racial stereotyping, cohesion, totality of circumstances), sidestepped three others with no comments or nonresponsive comments that never actually address the substantive conflict with prior authority (vote dilution, Ninth Circuit cases, *Gomez*) and mischaracterize and minimize a recent Sixth Circuit opinion directly contrary to the Opinion which overlooked it. Respondents offer up inapposite cases and irrelevant factual material that are simply not responsive to these arguments.

II. THE PANEL MAJORITY'S SPECIAL CIRCUMSTANCES ARGUMENT OVERLOOKS SETTLED VOTING RIGHTS JURISPRUDENCE

The Panel majority held that the District Court may disregard minority electoral successes based on the "special circumstance" of *pending litigation* solely because of

increased Anglo voter support for minority candidates, without examining the reasons for that increased support to determine if the reasons were *nonracial*. Once again, Respondents fail to respond, or to respond adequately, to the arguments advanced in the Petition that the Panel majority's new standard conflicts with controlling Supreme Court and voting rights case authority:

1. **On Account of Race or Color.** The Petition (pp. 20-22) establishes that under the express language of Section 2 plaintiffs must demonstrate that a minority electoral defeat (or "special circumstances" success) occurred "'*on account of race or color*,' . . . not on account of some other racially neutral cause." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083, 115 S. Ct. 1795 (1995). The Ninth Circuit adopted this construction of the Section 2 Voting Rights Act vote dilution claims in *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586, 596 (9th Cir. 1997). *All* vote dilution claims require proof that electoral losses occurred on account of race or color, in the absence of which federal courts have no jurisdiction. *Nipper*, 39 F.3d at 1515-16.

The Panel majority's new "special circumstances" legal standard for disregarding minority successes due to pending litigation necessarily conflicts with this mandatory statutory and jurisdictional "on account of race or color" requirement. The Panel majority opinion specifically permits the District Court to discount a minority electoral success due to pending litigation without proving *any relationship* between increased Anglo support for Hispanic candidates (which plaintiffs' experts *admitted* could be explained by factors other than pending litigation) and the pending litigation. This compelling conflict with Supreme Court, Ninth Circuit, and other Circuit authority, which Respondents fail to address, merits review by this Court.

2. **Causation.** The Panel majority's statement that motive to thwart a pending lawsuit "has no part in a vote dilution claim" is directly contrary to Supreme Court and other voting rights cases and is manifestly erroneous. Justice O'Connor's view in *Thornburg* that the causation, or the reasons why voters vote as they do, is relevant to the overall vote dilution inquiry now commands a majority on the Supreme Court. (Petition, pp. 21-22.) Numerous cases have considered evidence of motive to thwart a lawsuit to be relevant, including *Thornburg*, and the lack of such evidence was dispositive in other Circuit decisions. *Id.* Respondents *never* address the Supreme Court's causation jurisprudence with which the Panel majority obviously conflicts, other than to assert that the Fourth Circuit finds motive irrelevant, *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987). The Fourth Circuit, however, has now adopted the *Nipper* "on account of race or color" vote dilution analysis developed after *Collins*, rendering *Collins* of little weight. (Petition, p. 22.) This conflict with *Thornburg*, *Johnson*, *Smith* and *Nipper* warrrants review by this Court.

3. **Qualifications of Candidates.** Respondents wrongly state that part IV.D of the Opinion instructs the District Court to consider all relevant evidence. (Opposition, pp. 1,2,4, and 8). In fact, the Panel majority's new "special circumstances" pending litigation standard not only limits relevant evidence to increased Anglo support of Hispanic candidates but specifically holds irrelevant any evidence that increased Anglo support was due to *nonracial* factors such as the qualifications of the candidates and the strength of the campaigns they run (which plaintiffs' expert admits may be true). This holding is unsupported by any legal authority, is directly contrary to the instruction in *Johnson*, *supra*, that courts must consider the totality of the circumstances before reaching a conclusion about vote dilution and completely overlooks numerous decisions that discount the electoral

defeats of weak, minor or nonviable candidates that would give a false impression of the ability of minority voters to elect candidates of their choice. (Petition, pp. 22-23.) Respondents *never* address the relevance of such evidence or the obvious conflict between the Panel majority opinion on this issue with the Supreme Court's decision in *Johnson*, an issue that warrants review by this Court.

CONCLUSION

Respondents' Opposition, when properly considered against the compelling arguments presented in the Petition, offers up inapposite cases and is largely nonresponsive, refusing to acknowledge the obvious conflict with Supreme Court, Ninth Circuit and other Circuit Court authority of parts IV.B and IV.D of the Opinion, that merit review by this Court in accordance with Supreme Court Rule 10.

Respectfully submitted,

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